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No. 85-973

IN THE

Supreme Court of the United States

October Term, 1985

GEORGE VERNON HANSEN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

NATHAN LEWIN*
STEPHEN L. BRAGA
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

FRANK A. S. CAMPBELL
1607 New Hampshire Avenue, N.W.
Washington, D.C. 20009
(202) 667-9200
* *Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, WASHINGTON, D.C 20036 (202) 783-0420

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1. The only question before the Court at this juncture is whether the legal issues raised by this case are *important* enough to deserve plenary consideration. The decision of the court of appeals clears the way for possible criminal investigations by the Justice Department of the private finances of United States Senators and Representatives, and of all federal judges about whom any suspicion is raised. According to newspaper reports,

the criminal indictment of the 1984 Democratic Vice-Presidential nominee is contingent upon whether the decision below is correct, as are criminal proceedings against a number of other present and former Congressmen.[1] Whether Congress has, in fact, authorized such criminal investigations and prosecutions — in light of a murky legislative record[2] — warrants authoritative decision by this Court. It would surely be unfair to deny review of this petition only to have the issue recur, at some later date, in the case of a more nationally known Member of Congress.

The Solicitor General's Brief in Opposition fails totally to address the importance of the legal issue. The Solicitor General does not contest our statement that the Court of Appeals for the District of Columbia is the *only* federal court of appeals that is ever likely to consider the applicability of 18 U.S.C. §1001 to Members of Congress who submit incomplete or false EIGA reports (Pet. 13-14). Thus a very troublesome legal issue that has great practical significance and authorizes substantial inroads into the independence of the Legislative and Judicial Branches has been effectively decided by three intermediate federal appellate judges.

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1. While this case was pending in the court below, the prosecutor told a reporter that if petitioner's legal position is sustained, it will "close the door on a lot of [financial disclosure] cases being pursued for possible prosecution." *The Washington Times*, May 3, 1985, p. 3A ("Justice Set To Move in Ferraro Financial Allegations").

2. The prosecutor acknowledged in the court below that when EIGA was adopted there was "no consensus" and "no expression of the intent of Congress as a whole" on whether false statements could be criminally punished. The most he could claim in support of his legal position was that "some members" of the House believed there would be no criminal penalties while "other members" anticipated that Title 18 would apply (Gov't Brief in the Court of Appeals, pp. 31, 33, 42).

Many Members of Congress have expressed their strong disagreement with the decision of the court of appeals. In the lower court, 123 Members of Congress — Democrats as well as Republicans — filed an *amicus curiae* brief arguing vigorously that Congress had not imposed *any* criminal penalty when it enacted EIGA in 1978. The court below barely gave a nod to that firm statement of opinion from the Congress.

2. We believe, of course, that the court of appeals erred when it applied 18 U.S.C. §1001 — the False Statements Act adopted in 1909 and amended to its present form in 1948 — to a law enacted in 1978 that created a wholly new statutory duty for Members of Congress and the federal judiciary. None of the various bills that led up to the enactment of EIGA in 1978 remotely contemplated any criminal sanction more serious than a misdemeanor penalty for willful nondisclosures or falsifications on EIGA forms. Even the proposed misdemeanors were dropped during congressional deliberations because, as one Congressman perceptively noted, the bill would never have passed the House if Members of Congress believed that violations could result in criminal penalties. 124 *Cong. Rec.* 30457 (1978). As a result, only a civil procedure and civil penalty were prescribed by the law for anyone "who knowingly and willfully falsifies or who knowingly or willfully fails to report any information . . ." 2 U.S.C. §706.[3] No use of the civil rem-

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3. The effort made by the court below to reconcile this sweeping civil remedy with the application of 18 U.S.C. §1001 is unsuccessful. The court said that there is "a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of §706, while those who lie on their forms are additionally subject to the criminal penalty of §1001" (Pet. App. 7a-8a). But why would Congress have provided a civil $5,000 fine for anyone who "knowingly and willfully falsifies" if a person who

edy has ever been made. Instead, the Department of Justice has deliberately bypassed the civil route that Congress explicitly prescribed. The first violation of EIGA it has ever brought to a court has been a criminal case, invoking a criminal law that Congress never contemplated.[4]

The court below agreed that the legislative history of EIGA warrants the surmise that "some Members of Congress, and perhaps even a number providing the crucial margin for passage of the bill, would have objected" if 18 U.S.C. § 1001 had explicitly been made applicable. Pet. App. 10a-11a. Hence, the court below is prepared to see a Member of Congress imprisoned on felony charges even though it acknowledges that there would not have been a majority of the House endorsing a criminal sanction if it had been explicitly stated.

Contrary to the view expressed by the Solicitor General, this result conflicts with the general rule of lenity applied by this Court in criminal cases (*United States v. Bass*, 404 U.S. 336, 348 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971)). It also conflicts with the analysis provided by the Court in *Dowling v. United States*, 105 S. Ct. 3127 (1985). The court below failed to consider *Dowling* even though that decision was brought to its attention in a petition for rehearing. In all events, the

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NOTES *(Continued)*

"knowingly and willfully falsifies" may be criminally prosecuted under 18 U.S.C. §1001 and fined up to $10,000 — in addition to receiving a jail term? The "progression" to which the court below refers would have been effective if 2 U.S. C. §706 had not included the words "who knowingly and willfully falsifies."

4. We noted in our Petition that the same Congress that enacted EIGA knew exactly how to make 18 U.S.C. §1001 applicable. Laws enacted just days *before* EIGA and just days *after* it was adopted, explicitly made 18 U.S.C. §1001 applicable to other new statutory obligations. The Solicitor General totally ignores this obvious indicator of congressional intent in his Brief in Opposition.

legal issue presented is important enough and has a sufficiently significant impact on the Separation of Powers, that it deserves plenary review.

3. The Solicitor General acknowledges that there is a conflict among the Circuits over whether the element of materiality in a false-statement prosecution must be submitted to the jury. He argues that "[t]his Court has repeatedly denied certiorari in cases presenting the same contention and . . . [t]here is no reason for a different result here" (Br. in Opp. 5-6) (citations omitted).[5] But the Solicitor General overlooks the fact that all of the cases he cites concerned prosecutions for affirmative false statements. *See United States v. Greber*, 760 F.2d 68, 70 (3d Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, No. 84-1771, Br. in Opp. at 2; *United States v. Elkin*, 731 F.2d 1005, 1007 (2d Cir. 1984); *United States v. Abadi*, 706 F.2d 178, 179 (6th Cir. 1983). By contrast, this case involves information that has been omitted, so that this Court's observations in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), are directly applicable. *See* Pet. 20-21. *Accord, United States v. Johnson*, 718 F.2d 1317, 1324 n. 20 (5th Cir. 1983) (*en banc*) (distinguishing between false-representation and failure-to-disclose cases). In a failure-to-disclose situation, the judgment of a jury is particularly important in determining guilt or innocence because the issue of materiality is more factual than legal.

The Solicitor General also asserts that in this case the materiality of the omissions "cannot be doubted" (Br. in Opp. 7). In fact, we argued in the district court and in the court of appeals that precisely the opposite was true. Given the very limited oversight provided by the governing congressional committee, the omissions were, in our

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5. Justice White has indicated his belief, however, that certiorari should be granted to resolve this conflict. *See Greber v. United States*, No. 85-35, 54 U.S.L.W. 3328 (Nov. 12, 1985) (White, J. dissenting).

view, *immaterial as a matter of law*. One need not accept that agrument, however, to recognize that the issue should have been presented to the jury. This Court has noted that an accused's constitutional right to a jury trial must remain free of judicial interference "regardless of how overwhelmingly the evidence may point in [the Government's] direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977).

4. The Solicitor General virtually ignores the contention that it was improper for the prosecution to put a "legal expert" on the stand, treating it as a "fact-bound issue" committed to the district court's "discretion" (Br. in Opp. 8). The Solicitor General misunderstands what happened at the trial when he says that the petitioner "injected the issue of the reasonableness of his attorneys' interpretation of the EIGA into the case" (*id.*). "Reasonableness" was not the issue. The relevant question was whether petitioner had been given legal advice and had relied on it. (Petitioners' attorneys testified unequivocally that they had told him to omit the questioned items from his EIGA forms.) Whether a government "legal expert" agrees with the legal advice petitioner was given is irrelevant, and it carries prejudicial impact with the jury. The Sixth Circuit so held in the *Zipkin* case, and the Second, Eighth and Ninth Circuits have agreed. *See* Pet. 22-23. These appellate decisions rest on a proper understanding of the undue weight that a prosecution's "legal expert" can have with a jury. This Court should reverse the decision below so that prosecutors will not henceforth offer the testimony of "legal experts" to prejudice juries against criminal defendants.

For the foregoing reasons we believe that all the legal issues presented by our petition are sufficiently *important* to warrant full review by this Court. Once review is granted, the judgment below should be reversed.

Respectfully submitted,

NATHAN LEWIN*
STEPHEN L. BRAGA
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

FRANK A. S. CAMPBELL
1607 New Hampshire Avenue, N.W.
Washington, D.C. 20009
(202) 667-9200

* *Counsel of Record*

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